MOTION FILED JUL 15 1948

IN THE

Supreme Court of the United States

OCTOBER TERM, 1948.

No. 49, Miscellaneous.

MARGARET C. DONOVAN,

Petitioner,

—against—

QUEENSBORO CORPORATION, GARDEN HOUSING CORPORATION, THE TERMINAL HEIGHTS CORPORATION, QUEENSBORO INVESTING COMPANY, A. EDWARD MacDOUGALL, HENRY S. LOCKWOOD, A. EDWARD MacDOUGALL, as Executor of the Last Will and Testament of Edward A. MacDougall, Deceased,

Respondents.

MOTION FOR LEAVE TO FILE PETITION FOR WRIT OF CERTIORARI UNDER SECTION 262 OF THE JUDICIAL CODE.

EDWARD F. CLARK,
Counsel for Petitioner,
60 Wall Street,
New York City (5), N. Y.

EDWARD F. CLARK,
LEONARD J. REYNOLDS,
JOHN A. SHORTEN,
Of Counsel.

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Respondents.

MOTION FOR LEAVE TO FILE PETITION FOR WRIT OF CERTIORARI UNDER SECTION 262 OF THE JUDICIAL CODE.

To the Honorable Chief Justice and Associate Justices of the Supreme Court of the United States:

The petitioner, Margaret C. Donovan, a resident of the State of New Jersey, moves the Court for leave to file the petition hereto annexed for a writ of certiorari under Judicial Code, Section 262 (28 U. S. C. 377) and further moves that an order and rule be entered and issued directing the Circuit Court of Appeals, Second Circuit, to show cause why a writ of certiorari should not be issued to said Court in accordance with the prayer of said petitioner and why the petitioner should not have such other and further relief in the premises as may be just.

Dated: July 12, 1948.

MARGARET C. DONOVAN,
Petitioner,
By EDWARD F. CLARK,
Her Counsel.

IN THE

SUPREME COURT OF THE UNITED STATES,

OCTOBER TERM, 1948.

No. , Miscellaneous.

MARGARET C. DONOVAN,

Petitioner,

—against—

QUEENSBORO CORPORATION, GARDEN HOUSING CORPORATION, THE TERMINAL HEIGHTS CORPORATION, QUEENSBORO INVESTING COMPANY, A. EDWARD MACDOUGALL, HENRY S. LOCKWOOD, A. EDWARD MACDOUGALL, as Executor of the Last Will and Testament of Edward A. MacDougall, Deceased,

Respondents.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS SECOND CIRCUIT UNDER JUDICIAL CODE, SECTION 262, AND SUPREME COURT RULE XXXIX.

To the Honorable Chief Justice and Associate Justices of the Supreme Court of the United States:

The petition of Margaret C. Donovan respectfully shows:

SUMMARY STATEMENT OF THE MATTER INVOLVED.

1. The action upon which this petition is based is in part a stockholder's derivative action, brought by the petitioner, as plaintiff in the United States District Court for the Eastern District of New York, against stockholders, officers and directors of the defendant Garden Housing Corporation by reason of their wrongful and wasteful acts with respect to that Corporation's assets.

2. By an order made on November 24th, 1947, the District Court granted a motion of the defendants to the extent that it required the plaintiff to furnish security to the defendants for expenses including counsel fees, in the amount of $50,000 under the alleged requirement of Sections 61-b and 64 of the New York General Corporation Law and stayed all proceedings on the part of petitioner, as plaintiff, until she furnished such security (R. 9-11). Said District Court thereafter on December 19th, 1947, made a further order denying petitioner's application to modify such order so as to provide for a termination of the action by dismissal of the complaint if the $50,000 security should not be furnished within ten days (R. 11-12).

3. Petitioner appealed to the Circuit Court of Appeals, Second Circuit, from so much of said first order as imposed the stay and from the order secondly above mentioned (R. 13); which appeal was, on motion of the defendants (respondents here), dismissed by said Circuit Court of Appeals, without opinion (R. 23), and said Court subsequently on April 16th, 1948, denied petitioner's motion for a rehearing of the motion to dismiss the appeal, also without opinion (R. 35).

4. This petition, under Judicial Code, Section 262, which, under the calendar practice of this Court, will go on its Miscellaneous Calendar, is filed simultaneously with a petition for a writ of certiorari to the said United States Circuit Court of Appeals, Second Circuit, under Judicial Code, Section 240a (28 U. S. C. 347-a), and also under Judicial Code, Section 262, to review the same orders of said Circuit Court of Appeals. The two petitions thus seek alternative statutory methods of procedure for obtaining a review of the same orders of the Circuit Court of Appeals. There have been or will be filed with said petition under Judicial Code 240-a the required number of copies of the record and reference is hereby made to the said record for all facts appearing therein not herein

repeated; for the motion papers on the motion of the respondents to dismiss the appeal from the orders of the District Court hereinbefore mentioned, including the opinion of the District Court; for petitioner's papers in opposition to said motion; for petitioner's petition to the Circuit Court of Appeals for a rehearing of said motion to dismiss petitioner's appeal and for the orders of the Circuit Court of Appeals of which petitioner now seeks a review by this Court. Reference is also hereby made to petitioner's said petition under Judicial Code, Section 240-a, particularly to the summary statement therein, for all facts not contained in said record or in this petition under Judicial Code, Section 262.

JURISDICTIONAL STATEMENT.

This Court has jurisdiction to entertain this proceeding and to grant the relief prayed for by virtue of Judicial Code, Section 262 (28 U. S. C., Sec. 377) which is as follows:

> "The Supreme Court and the district courts shall have power to issue writs of scire facias. The Supreme Court, the circuit courts of appeals, and the district courts shall have power to issue all writs not specifically provided for by statute, which may be necessary for the exercise of their respective jurisdictions, and agreeable to the usages and principles of law."

While the procedure under the above quoted section appears to be more often resorted to on applications for writs of mandamus or prohibition, in cases such as *United States Alkali Export Association Inc.* v. *United States*, 325 U. S. 196, it was applied, for purposes of certiorari, directly to the U. S. District Court to review its order denying a motion of the defendants to dismiss a suit under the Sherman Act and in *DeBeers Consolidated Mines, Inc.* v. *United States*, 325 U. S. 212, to certiorari to the Dis-

trict Court to review its order granting a preliminary injunction against defendants in a like suit.

And in *Matter of 620 Church Street Bldg. Corp.*, 299 U. S. 24, this Court reviewed upon certiorari, which this Court had granted under Judicial Code 262, an order of the Circuit Court of Appeals denying leave to appeal from a District Court order in a bankruptcy matter. It is submitted that, for purposes of certiorari jurisdiction under said Section 262, the dismissal by the Circuit Court of Appeals of the appeal from the District Court, taken as of right in the instant action, is exactly analogous to the denial of leave to appeal by the Circuit Court of Appeals, in said *620 Church Street Bldg. Corp.* proceeding, so that said *620 Church Street Bldg. Corp.* decision is, for jurisdictional purposes, sufficient authority for this application for certiorari under Judicial Code 262.

Questions Presented and Reasons for the Allowance of the Writ.

These are the same, for purposes of this petition, as the questions presented and the reasons for allowance of the writ fully set out in said petition for certiorari under Judicial Code, Section 240-a and are hereby incorporated into this petition, by reference to said 240-a petition, with the same force and effect as though here fully repeated.

Brief in Support of Petition.

The brief printed, as attached to said 240-a petition, is hereby made by reference the brief in support of this petition with the same force and effect as though here fully repeated.

Dated: July 12, 1948.

MARGARET C. DONOVAN,
Petitioner,
By Edward F. Clark,
Counsel for Petitioner.